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No. 05-1541

In the Supreme Court of the United States

EC TERM OF YEARS TRUST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a party who would have been entitled to commence a timely action under 26 U.S.C. 7426 to challenge an allegedly wrongful Internal Revenue Service levy upon its property to collect taxes owed by another, but failed to commence such an action within the applicable limitations period, may seek a refund of the amount collected by the levy through a tax-refund action under 28 U.S.C. 1346(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 434 F.3d 807. The opinion of the district court (Pet. App. 8a-18a) is not published in the *Federal Supplement*, but is *available at* 2004 WL 911307.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2006. A petition for rehearing was denied on March 2, 2006 (Pet. App. 19a). The petition for certiorari was filed on May 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is one of several trusts created by Elmer and Dorothy Cullers. In 1999, the Internal Revenue Service (IRS) contended that the Cullers had trans-

ferred property to the trusts to avoid paying their federal income taxes, and the IRS filed tax liens against the trusts for income taxes that the IRS had assessed against the Cullers for tax years 1981 through 1984. Although petitioner and the other trusts disagreed with the IRS's contentions, in August 1999, they opened a bank account for the purpose of satisfying the Cullers's tax deficiency. The IRS then levied on the account, and the bank issued a check on October 5, 1999, to satisfy the levy. Pet. App. 2a; *BSC Term of Years Trust* v. *United States*, No. EP-00-CA-270-H, 2000 WL 33155870, at *2-*3 (W.D. Tex. Dec. 28, 2000).

Almost one year later, on September 7, 2000, petitioner (and others) filed an action against the United States pursuant to 26 U.S.C. 7426, which authorizes an action to challenge a wrongful levy, and 28 U.S.C. 1346(a)(1), which authorizes an action to recover erroneously collected taxes. See Pet. App. 2a, 9a. The district court dismissed the wrongful-levy claim, concluding that it was time-barred because it was not filed within nine months after the challenged levy, as required by 26 U.S.C. 6532(c)(1), and that petitioner had not made a proper request for return of the property that could have extended that nine-month limitation pursuant to the terms of 26 U.S.C. 6532(c)(2). *BSC Term of Years Trust*, 2000 WL 33155870, at *2-*3. In addition, the district court held that it lacked jurisdiction under 28 U.S.C. 1346(a)(1) because 26 U.S.C. 7426 "affords the *exclusive* remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." 2000 WL 33155870, at *2 n.1 (quoting *Texas Commerce Bank Fort Worth, N.A.* v.

United States, 896 F.2d 152, 156 (5th Cir. 1990)); see Pet. App. 3a n.3.[1]

Petitioner and the other trusts voluntarily dismissed their appeal from the district court's decision. See *BSC Term of Years Trust* v. *United States*, No. 01-50127, 2001 WL 722022 (5th Cir. Apr. 25, 2001).

2. On September 6, 2001, petitioner filed an administrative claim for refund of the amount that the IRS had collected by levy. Pet. App. 9a. After the claim was denied, petitioner filed this second action, alleging jurisdiction under 28 U.S.C. 1346(a)(1). Pet. App. 9a.[2] The district court dismissed the complaint on the ground that a wrongful-levy action under 26 U.S.C. 7426 is the "exclusive remedy for those in [petitioner's] circumstances." Pet. App. 17a. The district court rejected petitioner's claim that the decision in *United States* v. *Williams*, 514 U.S. 527 (1995), overruled the "longstanding

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[1] Under 28 U.S.C. 1346(a)(1), an action for a refund of taxes may be brought up to two years after the IRS disallows an administrative claim for refund, which in turn may be filed up to two years after the tax at issue is paid or up to three years after the taxpayer files a tax return with respect to the tax at issue. 26 U.S.C. 6511(a), 6532(a)(1).

[2] The district court denied the government's motion to dismiss the second action on "res judicata" grounds, which the court understood to be an argument based upon claim preclusion rather than issue preclusion. *EC Term of Years Trust* v. *United States*, No. EP-03-CA-363 (KC), 2004 WL 911307, at *2 & n.1 (W.D. Tex. Apr. 23, 2004). The court concluded that the earlier dismissal of petitioner's Section 1346 claim "would not be considered" as a disposition "on the merits for res judicata purposes" and could not receive "more deference than that given a dismissal on subject matter jurisdiction" grounds. *Id.* at *3. Accordingly, the court declined to give preclusive effect to the prior disposition of the Section 1346 claim. The government raised both claim and issue preclusion on appeal (Gov't C.A. Br. 37-44), but the court of appeals did not address either argument. The government does not press either preclusion theory in this Court.

exclusivity rule" with respect to wrongful-levy claims. Pet. App. 17a. In *Williams*, this Court held that a party "who paid a tax under protest to remove a lien on her property, ha[d] standing to bring a refund action under 28 U.S.C. § 1346(a)(1), even though the tax she paid was assessed against a third party," where she had "no realistic alternative to payment of a tax she did not owe" and would otherwise have been left "without a remedy." 514 U.S. at 529. The district court distinguished *Williams* from the facts of this case, where petitioner could have availed itself of the wrongful-levy remedy, but failed to bring a timely claim. Pet. App. 17a. The court declined to read *Williams* as holding that "third-parties, under ordinary circumstances, are no longer required to bring a wrongful levy action as such would create instability in federal government property resolutions inherent in the shortened statute of limitation applicable to such claims." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-7a. The court of appeals noted its prior decisions holding "that if § 7426 is available to an individual, then it is his sole and exclusive remedy," and it observed that the "short statute of limitations governing claims under § 7426 allows for the expeditious resolution of tax liability." *Id.* at 4a. The court concluded that *Williams* should not be read to suggest "that a refund action under § 1346 is available *in addition* to a wrongful levy action under § 7426." *Id.* at 5a. The court further observed that "to allow an alternative remedy under § 1346, with its longer statute of limitations period, *see* 26 U.S.C. §§ 6511(a), 6532(a)(1), would undermine the surety provided by the clear avenue to recovery under § 7426." *Ibid.*

ARGUMENT

The court of appeals correctly held that the wrongful-levy provisions of 26 U.S.C. 7426, as restricted by the applicable statute of limitations (26 U.S.C. 6532(c)), afforded the exclusive remedy available to petitioner to assert its claim, and that petitioner could not circumvent the limitations period applicable to such actions by pursuing a tax-refund suit under 28 U.S.C. 1346(a)(1). The United States agrees with petitioner, however, that this case presents a recurring question of substantial administrative importance on which there is a direct conflict among the courts of appeals. Review by this Court would therefore be appropriate.

1. a. The United States cannot be sued unless Congress has waived the government's sovereign immunity, and such waivers are strictly construed. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). Terms and conditions that Congress attaches to the legislative waiver of sovereign immunity are also strictly construed. *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms." *Dalm*, 494 U.S. at 608; *Block*, 461 U.S. at 287. Moreover, the terms of the government's "consent to be sued in any court define that court's jurisdiction to entertain the suit." *Dalm*, 494 U.S. at 608 (*United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941))). Thus, when a party fails to commence a suit against the United States within the limitations period, the government has not waived its sovereign immunity,

and the courts lack jurisdiction to entertain the suit. *Id.* at 608-610. Furthermore, even though Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941) (rejecting taxpayer's reliance in a tax-refund action on a general six-year statute of limitations for suits against the United States).

Congress has done precisely that with respect to wrongful-levy actions under 26 U.S.C. 7426. Section 7426 waives the government's immunity with respect to wrongful-levy actions brought against the United States by "any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property." 26 U.S.C. 7426(a)(1). A wrongful-levy action may be brought "without regard to whether such property has been surrendered to or sold" by the IRS. *Ibid.* Such actions are restricted, however, by Section 6532(c), which provides that "no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy." 26 U.S.C. 6532(c)(1); see 26 U.S.C. 6532(c)(2) (extending that limitation under certain circumstances). Courts have recognized that the enactment of this relatively short limitations period accommodates the need of the government to resolve expeditiously collection issues affecting a taxpayer's account. See, *e.g.*, *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980) ("[Section] 6532(c) protects the legitimate interest of the United States in requiring other claimants of the seized property to bring their claims quickly."); *Gordon* v.

United States, 649 F.2d 837, 843 (Ct. Cl. 1981) ("Congress was clearly concerned that levy contests more than 9 months after the levy would prevent ultimate collection of the tax, thereby endangering the federal treasury.").

Given this restriction on wrongful-levy actions, courts have long rejected claims, including refund claims, by property owners who were subject to an IRS levy to collect another's taxes, but who failed to challenge the levy within the limitations period provided by 26 U.S.C. 6532(c). See, *e.g.*, *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916-917 (8th Cir. 1998) (holding that, where Section 7426(a)(1) applies, quiet title actions under 26 U.S.C. 2410 are "foreclosed"); *Dahn* v. *United States*, 127 F.3d 1249, 1253 (10th Cir. 1997) (rejecting "attempt to circumvent the § 7426/ § 6532 time-bar" by invoking other "remedial sources," including Section 1346(a)(1));[3] *Williams* v. *United States*, 947 F.2d 37, 39 (2d Cir. 1991) (holding that the "two-year period set forth in section 6532(a)(1) for a refund of taxes does not apply" and that a wrongful-levy action is the "sole remedy available to an individual * * * who claims an interest in property that has been levied upon by the IRS for the purpose of satisfying the tax liability of another person"), cert. denied, 504 U.S. 942 (1992); *United Sand*, 624 F.2d at 738-739 (rejecting quiet-title claim brought by property owner under 28 U.S.C. 2410 more than nine months after a challenged levy on the ground that his "exclusive remedy" was a wrongful-levy action under Section 7426); see also *Gordon*, 649 F.2d at 843-844 (holding that the

[3] See *Dahn* v. *United States*, No. 93-C-953, 1996 WL 652787, at *4 (D. Utah Aug. 30, 1996) (stating that Dahn invoked 28 U.S.C. 1346(a)(1) and (f)).

statute of limitations for wrongful-levy actions applies to challenges to third-party levy actions brought under the jurisdiction of the Tucker Act, 28 U.S.C. 1491).[4] The decision below is in accord with this substantial line of precedent, and the court of appeals followed its "prior holdings that when § 7426 is available to an individual, then it is his sole and exclusive remedy." Pet. App. 6a-7a.[5]

b. The court of appeals correctly rejected petitioner's contention that this Court's decision in *United States* v. *Williams*, 514 U.S. 527 (1995), altered this

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[4] Petitioner notes (Pet. 7) that *Gordon* was the only decision prior to 1995 in which a court had held that there was an alternative (*i.e.*, an action under the Tucker Act) to a wrongful-levy suit under 26 U.S.C. 7426 for a party to challenge an IRS levy to collect the taxes of another. Significantly, however, the *Gordon* court recognized the importance of the relatively short limitations period applicable to a wrongful-levy suit, and held that a challenge to a levy brought under the Tucker Act must nonetheless be brought within the limitations period governing actions under 26 U.S.C. 7426.

[5] This case illustrates how a challenge to an IRS levy that is brought as a tax-refund suit may impede the tax collection process and disrupt the carefully integrated statutory scheme enacted by Congress. The IRS levied on petitioner's property to collect taxes assessed in 1993 for the 1981 through 1984 tax years. *BSC Term of Years Trust*, 2000 WL 33155870, at *1. The IRS generally may collect a tax by levy or judicial proceeding within ten years after assessment. 26 U.S.C. 6502(a)(1). Under 26 U.S.C. 6503(f)(1), the ten-year collection period is suspended from the date that the IRS seizes property by levy until "the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter." But there is no statutory provision that similarly suspends the collection period during the pendency of a tax-refund suit. It is now more than ten years since the assessments were made against the Cullers for the 1981 through 1984 tax years. If petitioner prevails in obtaining a refund of the amounts collected by levy, therefore, it may be too late for the IRS to collect the unpaid taxes from other sources.

longstanding rule. In that case, the Court held that Williams, who had paid under protest a tax that the IRS had assessed against a third party, had standing to bring a refund action under 28 U.S.C. 1346(a)(1). In so holding, the Court noted that none of the remedies that are potentially available to a party when the IRS seizes assets to satisfy the tax liability of another was "realistically open to Williams." 514 U.S. at 536. In particular, the Court observed that she could not have filed a wrongful-levy action under Section 7426, because the collection measure at issue was a tax lien rather than a levy. *Ibid.* Thus, emphasizing that Williams was otherwise "without a remedy," the Court concluded that "Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is." *Ibid.*[6]

As the court of appeals here concluded, *Williams* does not "allow litigants who could bring suit under § 7426 *also* to bring suit under § 1346." Pet. App. 5a. Contrary to petitioner's contention (Pet. 10-11), the fact that the *Williams* opinion noted the "evident breadth of § 1346(a)(1)" does not mean that the Court "implicitly determined that 26 U.S.C. § 7426 does not provide the exclusive remedy" to a party, like petitioner, whose situation falls squarely within the scope of Section 7426. As

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[6] In the wake of *Williams*, Congress enacted 26 U.S.C. 6325(b)(4)(A) and 7426(a)(4), which give persons in Williams' situation a remedy apart from a tax-refund suit. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3106(a) and (b)(1), 112 Stat. 732-733. Section 6325(b)(4)(A) allows a third party whose property is subject to a tax lien to request a certificate of discharge of the lien on his property and provides that the IRS shall issue such a certificate if the property owner provides a deposit or a bond for an amount equal to the government's interest in the property. Section 7426(a)(4) allows suit by the property owner to determine the value of the government's interest in the property if a certificate of discharge is issued.

the Tenth Circuit explained in *Dahn*, the *Williams* Court "was concerned solely with the reach of § 1346 per se; the exclusivity of a concurrent § 7426 claim was never in issue." 127 F.3d at 1253.

Nothing in *Williams* calls into question the long line of authorities recognizing the need for a speedy resolution of property disputes where the IRS levies on a party's property for the collection of another's unpaid taxes. Despite the general language of Section 1346(a)(1), Congress "provid[ed] less liberally" for parties whose property has been subjected to such a levy because of "special considerations, requir[ing] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447; see, *e.g.*, *United Sand*, 624 F.2d at 738. As the court below and the Tenth Circuit have recognized, *Williams* did not "overturn, sub silentio, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy." *Dahn*, 127 F.3d at 1253; accord Pet. App. 5a-6a.[7]

2. As petitioner notes (Pet. 4-5), the Ninth Circuit's decision in *WWSM Investors* v. *United States*, 64 F.3d 456 (9th Cir. 1995), directly conflicts with the decision in this case. *WWSM Investors* also conflicts with the Tenth Circuit's decision in *Dahn*, 127 F.3d 1249.

In *WWSM Investors*, a third party subject to levy filed an untimely wrongful-levy action, and then moved

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[7] Although petitioner points for support (Pet. 11) to the distinction drawn by *Williams* between pre- and post-deprivation remedies, 514 U.S. at 538, that distinction is of no force in the context of an allegedly wrongful levy because Section 7426 is both a pre- and post-deprivation remedy. The owner of property subject to levy may challenge the levy either before or after the property has been surrendered to (or sold by) the IRS, 26 U.S.C. 7426(a), as long as it does so within the limitations period set forth in 26 U.S.C. 6532(c).

for leave to amend the complaint to include a claim for a tax-refund under 28 U.S.C. 1346(a)(1). Although the Ninth Circuit held that the Section 7426 claim was time-barred, it held that WWSM Investors "may file suit for a refund under 28 U.S.C. § 1346(a)(1)." 64 F.3d at 459. The Ninth Circuit believed that this Court's decision in *Williams* "control[led]" the case because it viewed the levy in *WWSM Investors* as "functionally equivalent" to Williams's payment to discharge the lien in *Williams*. *Ibid.* As the dissent in *WWSM Investors* correctly observed, however, this Court's decision in *Williams* "recognized that Williams could not use the remedy of 26 U.S.C. § 7426 because there was no levy" and "did not allow that a non-levy remedy under § 1346(a)(1) was available when the exclusive levy remedy under § 7426 was barred by the statute of limitations." *Id.* at 459-460 (Brunetti, J., dissenting).

WWSM Investors was decided shortly after this Court's decision in *Williams*.[8] No other court of appeals has followed the Ninth Circuit in reading *Williams* to open federal courts to tax-refund suits by parties who could have brought a timely wrongful-levy action but failed to do so. To the contrary, both the Fifth Circuit in this case and the Tenth Circuit in *Dahn* have noted, but have declined to follow, the Ninth Circuit's approach. Pet. App. 6a; *Dahn*, 127 F.3d at 1253 & n.2. Moreover, apart from refund actions, courts of appeals (including the Ninth Circuit) have continued to reject attempts to circumvent the limitations period on wrongful-levy ac-

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[8] This Court decided *Williams* on April 25, 1995. 514 U.S. 527. The Ninth Circuit issued its initial decision in *WWSM Investors* on May 31, 1995; after the government filed a petition for rehearing, the court replaced its initial opinion with a majority opinion and a dissent on August 22, 1995. See 64 F.3d at 456-457.

tions through the use of other types of claims. See *Audio Invs.* v. *Robertson*, 67 Fed. Appx. 795, 797 (4th Cir. 2003) (per curiam) (rejecting a quiet-title action); *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) (rejecting garnishment action); *Fidelity & Deposit Co.* v. *City of Adelanto*, 87 F.3d 334, 335 (9th Cir. 1996) (rejecting quiet title action).

3. The square conflict that exists among the courts of appeals on the question presented in this case is a recurring one of substantial administrative importance. The issue recurs with sufficient frequency that the IRS has issued a Revenue Ruling to address it. See Rev. Rul. 05-49, 2005-30 I.R.B. 125, 2005 WL 1710988 (July 25, 2005) (stating that the IRS disagrees with *WWSM Investors* and will follow *Dahn*). Because of the conflict among the circuits, parties in the Ninth Circuit are presently permitted to challenge IRS levies through either a wrongful-levy action or a refund action, whereas similarly situated parties in the Fifth and Tenth Circuits are limited to wrongful-levy actions and a shorter limitations period. Review by this Court would be appropriate to ensure consistent application of the revenue laws throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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